

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

TRACY K. HEETER, DDS, INC., A
Professional Dental
Corporation, dba SOUTH BAY
HEALTH CENTER, fka HEETER,
KEATS, KWAN, WARD & RUSSO, A
Professional Dental
Corporation,

Debtors.

CHERRY AVENUE ASSOCIATES, a
Partnership, by and through
its partner, BRUCE C.
EDWARDS,

Plaintiffs,

vs.

TRACY HEETER, D.D.S., INC.;
WILLIAM M. WARD, AND JOHN
RUSSO, D.D.S.,

Defendant(s).

AND RELATED CROSS ACTIONS.

Case No. 97-53417 JRG

Chapter 11

Adversary No. 97-5300

MEMORANDUM DECISION

I. INTRODUCTION

This action involves conflicting claims to a twenty-five percent general partnership interest in Cherry Avenue Associates. Cherry Avenue Associates is a California general

1 partnership which owns an office building on Cherry Avenue in
2 San Jose, California. Dr. Tracy Heeter claims to own the entire
3 twenty-five percent interest. Dr. John Russo and William Ward
4 each claim to own one fifth of the twenty-five percent interest,
5 or five percent each. For the reasons set forth hereafter, the
6 court will enter judgment in favor of Dr. Russo and Mr. Ward.

7 **II. FACTUAL BACKGROUND**

8 Cherry Avenue Associates originally commenced this
9 proceeding as an interpleader action in Santa Clara County
10 Superior Court due to the conflicting claims of ownership of the
11 partnership interest. The adverse claimants are the debtor Tracy
12 K. Heeter DDS, Inc., and William M. Ward and John Russo, DDS.
13 Heeter's corporation listed the entire partnership interest in
14 the schedules filed with its Chapter 11 petition. Ward and
15 Russo claim ownership as the holders of legal title to a five-
16 percent interest each in Cherry Avenue Associates.

17 In the early 1980's, four dentists came together to form
18 the Professional Dental Corporation ("PDC"). The dentists were
19 Tracy Heeter, James Keats, Kenneth Kwan, and John Russo. The
20 individuals practiced dentistry together under the name of the
21 PDC. In addition to the four dentists, William Ward played an
22 important role in the operation of the PDC. Mr. Ward owned
23 South Bay Health Plan, Inc. ("SBHP") which provided certain
24 management services to the PDC.

25 SBHP handled several matters in addition to those
26 immediately relevant to the PDC. First, the dentists and Mr.
27 Ward invested individually in assets that they leased to the
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1 PDC, and SBHP's role was to manage these investments and prepare
2 personal tax returns for the dentists. The five men held some
3 of these investments collectively under an oral partnership
4 agreement.¹ Second, SBHP provided the day-to-day bookkeeping for
5 these interrelated business entities. It had an accounting
6 staff who worked in the three facilities the PDC maintained in
7 Northern California. PDC had an office in San Bruno and two
8 offices in San Jose ("Skyport" and "Cherry Avenue"). The Cherry
9 Avenue office was located in a building owned by Cherry Avenue
10 Associates.

11 Cherry Avenue Associates is a California general
12 partnership. In 1985 the partnership consisted of five
13 individuals, one of whom was Stan Davis. Davis owned a 25%
14 interest in the partnership which he wanted to sell. Toward the
15 end of 1985, the four dentists and Ward became aware that Davis
16 wanted to sell his interest in Cherry Avenue Associates.

17 On December 31, 1985, Davis entered into an agreement with
18 Ward, Russo, Kwan, Keats, and Heeter to transfer the Cherry
19 Avenue Associates partnership interest. This agreement was
20 signed by Davis as well as the four dentists and Ward. Pursuant
21 to the Cherry Avenue Associates partnership agreement, the
22 remaining partners of Cherry Avenue Associates had given consent
23 a few days prior to Davis transferring his interest. The
24 consent to transfer named the four dentists and Ward as
25 individuals. In March, 1986 an amended partnership statement

26
27 ¹ The oral partnership was also known as the "equipment partnership" and
28 "Russo, Kwan, Keats, Heeter, and Ward, A Partnership." The court will refer to
this partnership as "equipment partnership."

1 was filed which reflected the names of the individual dentists
2 and Ward.

3 In consideration for transferring his partnership interest,
4 Davis received \$190,000. Payment terms consisted of a down
5 payment of \$20,000 and a promissory note for \$170,000, with
6 monthly interest payments on the note until March 1, 1986 when
7 it became due. In addition, Ward, Russo, Kwan, Keats, and
8 Heeter, as security for the promissory note, assigned their
9 interest in Cherry Avenue Associates back to Davis. Both the
10 promissory note and the assignment were signed by the individual
11 dentists and Ward.

12 While the five men provided individual signatures for the
13 purchase and the granting of the security interest, payment for
14 the partnership interest was made by the business entities that
15 the men owned. The equipment partnership provided the \$20,000
16 down payment to Davis, with cash being advanced to the equipment
17 partnership by the PDC. Similarly, the interest payments on the
18 promissory note to Davis were made by the equipment partnership.

19
20 However, since the promissory note provided for a balloon
21 payment after only two months, the five men took steps to find
22 permanent financing. In order to obtain a long-term loan, the
23 dentists and Ward approached at least two financial
24 institutions. Ward handled negotiations for money under the
25 name of the equipment partnership. In the end, First Interstate
26 Bank provided a loan for the Cherry Avenue Associates' interest
27 with a guarantee by the PDC. Loan applications and promissory
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1 notes were executed in the name of the equipment partnership.
2 The proceeds from this loan were paid directly to Davis in order
3 to satisfy the short term note that the five men had given for
4 the Cherry Avenue Associates' interest. Since the First
5 Interstate loan had to be renewed annually, a subsequent loan
6 renewal in 1987 was also executed in the name of the equipment
7 partnership with a guarantee provided by the PDC.

8 Once permanent financing was in place, the accounting
9 personnel of SBHP accounted for the performance of the Cherry
10 Avenue Associates' interest. This arrangement seemed natural,
11 since the SBHP accountants accumulated income and expense
12 information relevant to several other tax-oriented investments
13 in which the dentists and Ward shared equally. The staff had
14 two choices as to how to capture income and expense information
15 for this asset. First, they could treat each 5% interest as a
16 separate asset and request from Cherry Avenue Associates
17 individual K-1s for the four dentists and Ward. Secondly, they
18 could obtain an aggregate K-1 for the five individuals as
19 partners and allocate income and expense five ways through the
20 individual tax returns and schedules. Either method produced
21 the same net tax effect for each of the five men. The
22 accounting staff chose the second method, and requested a single
23 K-1 from Cherry Avenue Associates for all five men. Similarly,
24 the staff included the Cherry Avenue Associates interest in the
25 equipment partnership balance sheet and statement of cash
26 position, although title to the real estate interest was taken
27 individually. The effect of consolidating the dentist's and
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1 Ward's tax and asset information was to produce greater
2 convenience for the SBHP accountants.

3 Convenience may have also been an important factor for
4 Cherry Avenue Associates when it issued a single K-1 to the
5 equipment partnership. But despite the single K-1, Cherry
6 Avenue Associates still sought signatures of each of the four
7 dentists and Ward when securing new bank loans. As an example,
8 no reference to the equipment partnership is made in loan
9 documents obtained by Cherry Avenue Associates from Bank of
10 America in 1988. The completed loan revision has locations for
11 the signatures of Ward and the four dentists as individuals.
12 Cherry Avenue Associates thus treated the 25% interest held by
13 the dentists and Ward differently depending upon whether they
14 were issuing a tax statement or negotiating financing.

15 Ward and Russo acted to correct what they saw as a mistake
16 in 1990 when they requested that the K-1s be issued directly to
17 them instead of the equipment partnership. Cherry Avenue
18 Associates complied with this request. In 1992, a controversy
19 arose when Heeter challenged this arrangement.² Heeter argued
20 that the entire Cherry Avenue Associates interest had been owned
21 by the equipment partnership. Further, Heeter insisted that all
22 assets of the partnership were transferred to the PDC. Finally,
23 in a document with an effective date of January 1, 1987, Heeter
24 purported to liquidate the equipment partnership with Heeter as
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26 _____
27 ² Kwan and Keats did not participate in this dispute because the evidence
28 shows that Kwan and Keats each assigned their 5% interest in the partnership to
Heeter.

1 sole signatory for the partnership.³ When Cherry Avenue
2 Associates told Ward and Russo of this contention in 1992, the
3 two men denied that the equipment partnership ever owned the
4 partnership interest and made reference to the individually
5 signed partnership documents as evidence of their ownership.

6 **III. DISCUSSION**

7 **A. The Holder of Legal Title Is Presumed to Be the Full**
8 **Beneficial Owner and Clear and Convincing Evidence Is**
9 **Required to Rebut the Presumption.**

10 Although this action is tried in federal court, legal
11 issues relating to real property interests are determined by the
12 laws of the state in which the property is located. Butner v.
13 United States, 440 U.S. 48, 99 S. Ct. 914 (1979). Since the
14 Cherry Avenue Associates property is located in California,
15 California law is controlling.

16 California law favors the party named on legal title
17 whenever another party asserts an ownership interest. At common
18 law in California the holder of the legal title was presumed to
19 own the full beneficial interest in the property. Woodside v.
20 Hewel, 109 Cal. 481, 42 P. 152 (1895), Olson v. Olson, 4 Cal. 2d
21 434, 49 P.2d 827 (1935), Rench v. McMullen, 82 Cal. App. 2d 872
22 (1st Dist. 1947). This common law presumption was so strong
23 that it was codified by the California legislature in 1965 as
24 California Evidence Code § 662. California Evidence Code §

25 ³ Heeter was the sole signatory on the "Liquidation of Partnership
26 Agreement." (Heeter's exhibit 22.) There is no execution date on this document,
27 only an "effective date." Ward and Russo claim this document was "backdated"
28 and that they received no notice of dissolution. Heeter purports to have
assigned assets he gained personally in this dissolution to the PDC, which later
became "Tracy K. Heeter, DDS, Inc."

662(a) provides that:

The owner of the legal title to property is presumed to be the owner of the full beneficial title.

As the presumption is now established by statute, the next question concerns the nature of proof required to rebut the presumption afforded the holder of legal title. California Evidence Code § 662(b) provides that:

This presumption may be rebutted only by clear and convincing proof.

Clear and convincing evidence requires a more convincing showing than that of the usual preponderance of the evidence standard.⁴ California courts have developed the concept of clear and convincing evidence over the last hundred years. As early as 1899, in Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543 (1899), the California Supreme Court held that a deed could not be found to be a conveyance in trust because the evidence, consisting only of testimony from the plaintiff, was not "clear, convincing and conclusive" as to the trust being created in the decedent's wife.⁵ Sheehan, 126 Cal. at 193. An often cited case concerning

⁴ California Evidence Code § 115 expressly names several different levels of proof which may be required in different legal circumstances.

The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

... Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.

⁵ Sheehan cites a number of earlier cases where a party attempted by parol evidence to overcome a written deed in some way. See id.193-194. See also Mahoney v. Bostwick, 96 Cal. 53, 30 P. 1020 (1892). "[T]he presumption of law,

1 the conveyance of real property is Olson v. Olson, 4 Cal. 2d
2 434, 49 P.2d 827 (1935), in which the plaintiff, the former wife
3 of the defendant, attempted to overcome her prior written
4 conveyance of real property. She alleged that her agreement to
5 convey her interest in real property to her former husband was a
6 temporary one and only for purposes of refinancing while she was
7 overseas. The California Supreme Court stated, "the burden was
8 upon her to establish by clear and convincing evidence that a
9 promise was made" by her husband to restore title to her. In
10 Olson the court found no clear and convincing evidence to rebut
11 the presumption that ownership rested with her husband's estate
12 because Olson could not "produce the letter which she claimed
13 contained the promise and relied solely upon her own testimony
14 to support her contention." Olson, 4 Cal. 2d at 437.

15 The California Court of Appeal again applied the clear and
16 convincing standard where the plaintiff alleged a trust with the
17 defendant in Toney v. Nolder, 173 Cal. App. 3d 791 (1st Dist.
18 1985). In Toney, the plaintiff gave retirement plan proceeds to
19 the defendant to hold in the defendant's name in a savings
20 account. The defendant subsequently used funds to purchase a
21 condominium in her own name. The court held that "the burden
22 was still upon plaintiff to prove by clear and convincing
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24 _____
25 independent of proof, is that the instrument is what on its face it purports to
26 be, an absolute conveyance, and ... this presumption should be allowed to
27 prevail unless the evidence ... is *entirely plain and convincing*." Id. at 58
28 (emphasis added). See further Cal. Jury Instr. - Civ. (8th ed.) 2.62 for a
discussion of relevant language in these cases. "Clear and convincing evidence
means evidence of such convincing force that it demonstrates, in contrast to the
opposing evidence, a high probability of the truth of the fact[s] for which it
is offered as proof." Id.

1 evidence either that he entrusted the management and control of
2 his funds to defendant, or that the parties had an oral
3 partnership agreement for the purchase of the property." Toney,
4 at 796.

5 While in Olson and Toney the court was faced with the
6 plaintiff's testimony as to the alleged agreements, in Rench v.
7 McMullen, 82 Cal. App. 2d 872 (1st Dist. 1947), the court was
8 presented with written evidence as well as testimony allegedly
9 supporting the plaintiff's argument as to the existence of a
10 trust established in favor of the plaintiff. The plaintiff
11 alleged that defendant took title to property in his name as a
12 loan to plaintiff. In support, plaintiff introduced a ledger
13 account in the plaintiff's handwriting showing expenditures on
14 the property as well as advances to and repayments by plaintiff
15 of certain sums on four occasions. These same facts were also
16 susceptible to the defendant's theory of the business
17 relationship that existed with the plaintiff. The Court of
18 Appeal viewed the written evidence as equivocal as to the intent
19 of the parties. Rench, at 875. Accordingly, the court in Rench
20 held that the plaintiff's written evidence as added to the
21 testimony did not overcome the presumption of beneficial
22 ownership resting with the legal titleholder.

23 Two additional Court of Appeal cases help to define the
24 standard of clear and convincing evidence. In Tannehill v.
25 Finch, 188 Cal. App. 3d 224 (4th Dist. 1986), plaintiff alleged
26 an agreement with defendant and sued for breach of contract over
27 real property (on the theory in Marvin v. Marvin, 18 Cal. 3d
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1 660, 134 Cal. Rptr. 815 (1976)). Holding California Evidence
2 Code § 662 applicable, the Court of Appeal reversed the trial
3 court and required that the plaintiff establish her claim to 50%
4 interest in the property by clear and convincing evidence. The
5 court noted that the clear and convincing evidence standard
6 "requires that the evidence be so clear as to leave no
7 substantial doubt in the mind of the trier of fact." Tannehill,
8 at 228.

9 Similarly, in Lillian F. v. Superior Court, 160 Cal. App.
10 3d 314 (1st Dist. 1984), which concerned a conservatee's lack of
11 capacity, the court applied the clear and convincing evidence
12 rule. The court stated, "clear and convincing evidence requires
13 a finding of high probability." Lillian F., at 320 (citing In
14 re Angelia P., 28 Cal. 3d 908 (1981)). "Such a test requires
15 that the evidence be 'so clear as to leave no substantial
16 doubt'; 'sufficiently strong to command the unhesitating assent
17 of every reasonable mind.'" Lillian F., at 320 (citing Sheehan
18 v. Sullivan, 126 Cal. 189 (1899)). Thus, the holder of legal
19 title is presumed to be the full beneficial owner and clear and
20 convincing evidence is required to rebut the presumption.

21 **B. The Legal Standard of Evidence Code § 662 Is Applicable**
22 **to This Case.**

23 The parties agree that the four dentists and Ward signed
24 the Cherry Avenue Associates documents as individuals without
25 reference to the equipment partnership at the time of the
26 transfer from Davis.⁶ It is clear that Ward and the four

27 ⁶ Including the partnership agreement as well as the promissory note and
28 conditional assignment to Stan Davis.

1 dentists originally held legal title. Having established that
2 the clear and convincing evidence standard is applicable to
3 cases where beneficial title to property is contested but legal
4 title is not, the court now considers Heeter's arguments as to
5 why this legal standard should not apply in this case.

6 Heeter raises three legal arguments against the use of the
7 clear and convincing standard. He first argues this case is
8 analogous to Murray v. Murray, 26 Cal. App. 4th 1062 (5th Dist.
9 1994), which held that section 662 was not applicable to all
10 quiet title actions. Murray reasoned that since the plaintiff
11 challenged the legal title held by the defendant, the
12 presumption embodied in section 662 was not available. However,
13 this case differs from Murray. In this dispute equitable title
14 is at issue, but legal title is not. The parties do not
15 disagree that the signatures of Ward and Russo are on the
16 partnership documents. No claim of an illegitimate transfer or
17 fraud exist in this case to cast doubt on legal title held by
18 Ward and Russo.

19 This case is similar to the many cases that have applied
20 section 662 where equitable title alone was contested. For
21 instance, in Toney v. Nolder, 173 Cal. App. 3d 791 (1st Dist.
22 1985), there was no question about who held legal title. The
23 question centered on the oral agreement purportedly giving the
24 plaintiff an equitable interest in the property. Similarly in
25 Tannehill v. Finch, 188 Cal. App. 3d 224 (4th Dist. 1986), legal
26 title rested solely in Tannehill. The controversy centered on
27 Finch's allegations that the parties intended to share equally
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1 in the real estate. In both Toney and Tannehill, the
2 evidentiary standard of section 662 was applied. Since the
3 dispute over equitable title in this case is the same as in
4 Toney and Tannehill, and is distinguishable from Murray, the
5 application of section 662 is not called into question by
6 Murray.

7 Secondly, Heeter asserts a repudiation of the clear and
8 convincing standard by the California Supreme Court in Liodas v.
9 Sahadi, 19 Cal. 3d 278 (1977). However, the holding in Liodas
10 was limited to circumstances of fraud.⁷ The matter of legal
11 title represents a different issue for California courts. The
12 court noted that: "Allegations ... that legal title does not
13 represent beneficial ownership have ... been historically
14 disfavored because society and the courts have a reluctance to
15 tamper with duly executed instruments and documents of legal
16 title." Weiner v. Fleishman, 54 Cal. 3d 476, 489, 286 Cal.
17 Rptr. 40 (1991). Looking beyond Liodas, there is more than
18 ample California case law to support the application of section
19 662's clear and convincing standard to claims to real estate
20 when legal title is clear.⁸

21 _____
22 ⁷ Heeter's reliance on Liodas is difficult to understand because its
23 holding expressly concerned fraud and not legal title to real estate. In fact,
24 Liodas further stated, "[t]he standard of proof by clear and convincing evidence
25 is required on certain issues by statute ... and by case law" Liodas, at
26 291. The limitation of the Liodas holding was further explained in Weiner v.
27 Fleischman, 54 Cal. 3d 476, 816 P.2d 892 (1991) and DRG/Beverly Hills, Ltd. v.
28 Chopstix Dim Sum Café and Takeout III, Ltd., 30 Cal. App. 4th 54 (2nd Dist.
1994).

⁸ See Sheehan v. Sullivan, 126 Cal. 189, 193, 58 P. 543 (1899), Olson v.
27 Olson, 4 Cal. 2d 434, 49 P.2d 827 (1935), Rench v. McMullen, 82 Cal. App. 2d 872
28 (1st Dist. 1947), Toney v. Nolder, 173 Cal. App. 3d 791 (1st Dist. 1985) ,
Tannehill v. Finch, 188 Cal. App. 3d. 224 (4th Dist. 1986).

Heeter's third argument against the application of § 662 is that certain provisions of the California Corporations Code defeat the presumption in favor of the legal titleholder. Specifically, Heeter cites section 15008 of the Uniform Partnership Act and its successor section 16204 under the 1994 Uniform Partnership Act.⁹ Since section 15008 is applicable to the partnership in this case, the court considers its provisions:

- (1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.
- (2) **Unless the contrary intention appears, property acquired with partnership funds is partnership property.**
- (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.
- (4) A conveyance to a partnership in the partnership name, though not without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

Cal.Corp.Code § 15008 (emphasis added.)

Although the language of § 15008(2) does not refer to a presumption, Heeter argues a presumption arises against Ward and Russo if equipment partnership funds were used to purchase Cherry Avenue Associates.¹⁰ However, section 15008(2) has not

⁹ See West's Ann.Cal.Corp.Code. California Corporations Code § 15008 was repealed under the terms of Stats.1996, c. 1003 (A.B.583), § 1.2, operative January 1, 1999. California Corporations Code § 16204 was added by Stats.1996, c. 1003 (A.B.583), § 2, applying on January 1, 1999 to partnerships formed before January 1, 1997.

¹⁰ California Corporations Code § 15008 Historical and Statutory Notes do not indicate an intention to create presumptions under this section. Section 15008 derives without variation from the Uniform Partnership Act of 1914, § 8

1 been treated as a presumption by California courts.¹¹ Instead,
2 numerous California decisions resolve whether property is owned
3 by a partnership by examining the facts to establish the
4 intentions of the partners.¹² Nor is § 15008(2) treated as a
5 presumption in treatises on California law. See e.g., Witkin, 1
6 California Evidence, Burden of Proof and Presumptions, §§ 127 -
7 283 (3d ed. 1986); 31 CALJUR, Presumptions and Inferences, §§ 96
8 - 136 (3d ed. 1976).

9 Yet even if § 15008(2) of the Corporations Code and § 662
10 of the Evidence Code were considered to raise opposing
11 presumptions, section 15008(2) cannot apply because of the
12 higher evidentiary standard expressly attached to section 662.
13 This higher evidentiary standard reflects the underlying policy
14 of the statute. "The function of a standard of proof ... is to
15 'instruct the factfinder concerning the degree of confidence our
16 society thinks [the factfinder] should have in the correctness

17 _____
18 (Unif.Partnership Act 1914 § 8). The Comment to section 8 of the Uniform
19 Partnership Act does not describe the second paragraph, or any part of section
20 8, as a presumption.

21 ¹¹ Heeter cites one case that mentions Corporations Code § 15008(2)
22 giving rise to a presumption of ownership by a partnership when partnership
23 funds are used. In re Fair Oaks, Ltd., 168 B.R. 397 (1994), the court held
24 against a legal title holder based upon conveyance of a deed of trust by the
25 former general partner of Fair Oaks, Ltd. to an accounting firm which provided
26 services to the general partner's other projects. In re Fair Oaks, Ltd. is
27 distinguishable from the case at hand, because the issue for the court was
28 whether Fair Oaks had received less than a reasonably equivalent value in
exchange for the deed of trust. Since no consideration was received by Fair
Oaks, and the lien met the other criteria in 11 U.S.C. 548(a), the deed of trust
was avoidable as a fraudulent transfer.

¹² In his trial brief, Heeter cites Pluth v. Smith, 205 Cal. App. 2d 818
(2d Dist. 1962). However, Pluth does not rely on any finding of presumption in
section 15008(2). The court stated: "[w]hether or not real property standing
in the names of individual partners is partnership property is a question of
fact." Id. at 826.

1 of factual conclusions for a particular type of adjudication.'"
2 Addington v. Texas, 441 U.S. 418, 423, 99 S. Ct. 1804 (1979)
3 (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970)).
4 Since the California legislature has specifically provided that
5 a higher evidentiary standard will give a preference to holders
6 of legal title, the provisions of Evidence Code § 662 would
7 control over Corporations Code § 15008. Thus, California
8 Evidence Code § 662's presumption in favor of the legal title
9 holder applies to this case.

10 **C. Heeter Cannot Prove His Ownership of Cherry Avenue**
11 **Associates by Clear and Convincing Evidence.**

12 Having found no reason to disregard the presumption arising
13 out of legal title based on the facts of this case, Ward and
14 Russo are entitled to its benefit. As a result, Heeter must
15 first rebut the presumption. "A presumption is an assumption
16 of fact that the law requires to be made from another fact or
17 group of facts found or otherwise established in the action."
18 Cal.Evid.Code § 600(a). Therefore, unless Heeter can make a
19 "sufficient contrary showing," the law requires the court to
20 conclude Ward and Russo hold full beneficial interest in the
21 property.¹³

22 Moreover, Heeter must rebut the presumption with clear and
23 convincing evidence. Meeting the standard requires that Heeter
24 make a showing of evidence "so clear as to leave no substantial
25 doubt" that Ward and Russo do not each own 5% of Cherry Avenue
26 Associates. Sheehan v. Sullivan, 126 Cal. 189, 193 (1899); In

27 ¹³ West's Ann.Cal.Evid.Code § 600. Comment - Assembly Committee on
28 Judiciary.

1 re Angelia P. 28 Cal. 3d 908, 919 (1981).

2 Heeter points to four factual circumstances that he says
3 show that the five men intended the title to the Cherry Avenue
4 Associates partnership interest be held by the equipment
5 partnership. These circumstances can be summarized as: (1) the
6 equipment partnership was an investment vehicle typically used
7 by the five men for collective investments, (2) the equipment
8 partnership issued checks for payment to Davis and eventually
9 obtained permanent financing in its name, (3) Cherry Avenue
10 Associates issued a single K-1 to the equipment partnership, and
11 (4) accounting personnel working for the PDC consolidated the
12 Cherry Avenue Associates interest for tax and financial
13 purposes. The court will examine each of these circumstances to
14 determine whether Heeter can rebut the presumption in favor of
15 Ward and Russo with clear and convincing evidence.

16 First, Heeter points to the fact that the equipment
17 partnership was an investment vehicle typically used by the five
18 men in order to show an intent that the Cherry Avenue Associates
19 interest be owned by the equipment partnership. The evidence is
20 clear and the parties do not dispute that an oral partnership
21 existed between the four dentists and Ward. However, the
22 existence of a partnership between the five men does not
23 necessarily prove an intention for the equipment partnership to
24 own the Cherry Avenue Associates interest. Cherry Avenue
25 Associates was a passive investment, requiring no management by
26 the four dentists and Ward. However, an inference of intent to
27 own the office building in the partnership might arise if the
28

1 obvious operational purpose of the equipment partnership
2 required the Cherry Avenue Associates interest be included in
3 the equipment partnership's inventory of assets. But no such
4 purpose existed in this case. Moreover, no reference was made
5 to the equipment partnership in the Cherry Avenue Associates
6 partnership transfer documents.¹⁴

7 Second, Heeter points to the factual circumstances that the
8 equipment partnership issued checks for payment to Davis and
9 eventually obtained permanent financing in the equipment
10 partnership name to show an intent that the equipment
11 partnership own the partnership interest. Evidence of payment
12 and financing for the property shows that the equipment
13 partnership issued the checks for the down payment for Cherry
14 Avenue Associates, the interest payments on the short term
15 promissory note, and the interest payments on the long-term
16 promissory note with First Interstate.¹⁵ However, the PDC
17 advanced the \$20,000 down payment to the partnership which in
18 turn issued the check.¹⁶ Therefore, the source of the funds for
19 the down payment does not appear to be the partnership. Rather
20 it was the PDC, which is owned by the four dentists, that
21 provided the cash needed for the convenience of the five
22 individuals.

23
24 ¹⁴ Ward and Russo's exhibits B, C, D, E.

25 ¹⁵ Heeter's exhibit 26 shows a check for \$190,000, dated 12/31/95, from the
26 equipment partnership to Stan Davis. This figure represents the entire purchase
27 price of the property, although a promissory note to Stan Davis was also
executed for \$170,000.

28 ¹⁶ Heeter's exhibit 25.

1 In addition to the down payment made by partnership check,
2 Heeter points to the fact that Ward applied for and obtained
3 long-term financing in the name of the partnership, not the five
4 men individually. However, the fact that the loan application
5 was made in the name of the partnership is susceptible to
6 alternative interpretations. Testimony at trial indicated that
7 Ward believed financing in the names of the individuals would be
8 difficult to secure. Further, the equipment partnership had
9 established credit with First Interstate in 1983 which allowed
10 Ward to submit the application with a financial statement the
11 bank had seen before. Therefore, it is difficult to conclude
12 that either the payment of the down payment by the equipment
13 partnership or the way in which long-term financing was secured,
14 demonstrate an intent that the Cherry Avenue Associates interest
15 be owned by the equipment partnership.

16 Third, Heeter claims that the fact that Cherry Avenue
17 Associates issued a single K-1 to the equipment partnership
18 demonstrates an intent that the Cherry Avenue Associates
19 interest be owned by the equipment partnership. Heeter argues
20 that the practice of consolidating the K-1 demonstrates that
21 Cherry Avenue Associates believed, or was advised, that the
22 interest was owned by the equipment partnership during the
23 initial period of ownership. However, Cherry Avenue Associates
24 does not appear to have been of the belief or under any
25 instructions during the initial period to treat the 25% interest
26 as if it were owned by the equipment partnership. Moreover,
27 amended statements of partnership of Cherry Avenue Associates
28

1 demonstrate that Cherry Avenue Associates treated the five men
2 as individuals in 1986 and 1987, not collectively under the name
3 of the equipment partnership.¹⁷ Moreover, Cherry Avenue
4 Associates continued to act in this manner in 1988 by having the
5 five men sign as individuals on the Bank of America loan
6 revision documents.¹⁸

7 Fourth, Heeter points to the practice used by SBHP
8 accounting personnel of consolidating the Cherry Avenue
9 Associates interest for tax and financial purposes. Since the
10 accounting personnel placed the office building interest inside
11 the equipment partnership for purposes of the five men's income
12 taxes and preparing financial statements for the bank, Heeter
13 argues that we can logically and reasonably draw the conclusion
14 that title to Cherry Avenue Associates was intended to be in the
15 equipment partnership. However, this conclusion cannot be so
16 readily made. Testimony for Ward and Russo indicated that the
17 financial treatment of the office building interest by SBHP
18 personnel was driven by tax accounting convenience and an
19 interest in presenting a single financial statement to the bank.
20 Since the accounting and tax treatment is equally consistent
21 with either Heeter's or Ward and Russo's argument, it cannot be
22 given the effect of clear and convincing evidence in favor of
23 Heeter.¹⁹

24
25 ¹⁷ Ward and Russo's exhibits E and Y, respectively.

26 ¹⁸ Ward and Russo's exhibit G.

27 ¹⁹ The facts in Rench v. McMullen, 82 Cal. App. 2d 872 (1st Dist. 1947) are
28 analogous to Heeter's evidence in this area. In Rench, the plaintiff,
attempting to overcome legal title in the defendant, showed ledger entries in

1 Thus, the evidence presented by Heeter is not satisfactory
2 or is susceptible to the alternative interpretation of simple
3 convenience for the partners and their accountants. Heeter has
4 not met the applicable burden of proof required to rebut the
5 presumption that favors Ward and Russo.

6 **IV. CONCLUSION**

7 Heeter claims that the four dentists and Ward intended that
8 title to the Cherry Avenue Associates partnership interest be
9 held by the equipment partnership. Somehow, Heeter claims that
10 he now owns all 25% of the acquired partnership interest.
11 Because legal title is in the name of the five individuals,
12 Heeter has the burden of proof to rebut the presumption that the
13 five individuals do not in fact own the partnership interest.
14 Based upon a review of the evidence, the court concludes that
15 Heeter has not met this burden under the clear and convincing
16 evidence standard. Accordingly, Ward and Russo each own 5% of
17 Cherry Avenue Associates as individuals. Heeter owns the
18 remaining 15% of the partnership interest.

19 The forgoing shall constitute the courts findings of fact
20 and conclusions of law pursuant to Bankruptcy Rule 7052 and
21 Federal Rule 52. Counsel for Russo and Ward shall lodge a
22 proposed form of judgment with the court within 15 days. It
23 need not contain the findings and conclusions which the court
24 has made in this memorandum.

25
26 _____
27 support of his claim. However, the court found the evidence "equally
28 consistent" with both the defendant's and plaintiff's theories and unhelpful in
establishing an oral trust in favor of the plaintiff. Rench, at 875.